

PATENT APP. NO. 10/668,297
ATTY. DOCKET NO. 53394.000720
RESPONSE TO APRIL 6, 2005 OFFICE ACTION

III. REMARKS/ARGUMENTS

A. Status of the Claims

Claims 1-45 are pending in the application. Claims 1-45 stand rejected by the Examiner. Applicants respectfully request reconsideration of the rejections of claims 1-45 for at least the following reasons.

B. Claim Rejections under 35 U.S.C. § 103

Claims 1-45 stand rejected under 35 U.S.C. § 103(a) as allegedly rendered obvious by U.S. Patent No. 6,229,061 to Dragoo *et al.* ("Dragoo"). Specifically, with regard to claims 1-5, 22, and 24, the Office Action asserts Dragoo "discloses the step of providing a series of at least 2 types of absorbent products, each product type differing from at least one other product type in at least two ways, such as size and absorbency. Office Action, Pages 2-3 (citations to Dragoo omitted). However, the Office Action admits that

Dragoo does not specifically disclose two or more absorbent product designations and conveying an association between each of the two or more absorbent product designations and a combination of one of the size designations and one of the absorbency designations that indicate greater applicability of one type over another.

Office Action, Page 3. Nevertheless, the Office Action continues, contending that

[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to inform the consumer about what type of absorbent article to use depending on the child and signals displayed by the child so that the consumer would know what type of absorbent article to use. Since the package includes different types of size and absorbent capacities, it is considered obvious to instruct the consumer on what size/capacity is appropriate for different sizes for an appropriate fit or for different absorbency, which may convey stages of toilet training development so that the article can be used efficiently.

Id.

As a separate ground for rejection, with regard to claims 1 and 6-45, the Office Action asserts that:

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Dragoo discloses packaging of different types of absorbent articles. It is well known in the art that diapers such as disclosed by Dragoo are sold in many different sizes, such as for premature babies, normal (average) sized babies, older babies (older than 12 months), and toddlers (24 months and beyond). The recited limitation of identifying or marking two or more absorbent product designations wherein each product designation is associated with one or more absorbency designations would be within the level of one of ordinary skill in the art since Dragoo provides at least three different absorbency capacities (col. 12, lines 54-66) and it would be obvious for those diapers to also convey three different sizes so that the consumer can have a product that fits correctly or alternatively that fits a projected size of the child corresponding with a stage of toilet training or an adult for bladder control. The recited steps of identifying information describing content, size, and/or absorbency is satisfied by the fact that it is well known and obvious to one of ordinary skill in the art at the time the invention was made to provide sizing information on packages of absorbent articles so that the consumer can purchase the correct size. The size of the child or adult is an indicator as to the size of the absorbent article that is required.

Id. at Pages 3-4. Applicants respectfully disagree with both grounds for rejection, because the Office Action has failed to establish a *prima facie* case of obviousness.

In order to establish a *prima facie* case of obviousness, at least two criteria must be met. First, there must be some motivation or suggestion to make the proposed combination or modification of the references. Further, "the teaching or suggestion to make the claimed combination must be found in the prior art, and not based on the applicant's disclosure." MPEP 2142, discussing *In re Vaeck*, 947 F.2d 488 (Fed. Cir. 1991). In addition, the combined, or modified, references must teach or suggest all claim limitations.

The Office Action has failed to identify any teaching or suggestion to make the proposed combination *in the prior art*. Dragoo discloses a package containing absorbent articles and inserts that may "include a plurality of articles or inserts that have different absorbent capacities in order to provide even a greater variety of absorbent capacities."

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Col. 12, ll. 54-57.¹ This may arguably suggest that Dragoo's package includes some sort of identification of *package contents*. However, this does not suggest the use of the claimed visual indication device, which requires "an association between each of the two or more absorbent product designations and a combination of one of the size designations and one of the absorbency designations, wherein the association identifies one or more absorbent product designations that are predicted to satisfy a user's fit and absorbency requirements." The logical jump from the limited disclosure of Dragoo to the claimed invention appears to be the result of the application of impermissible hindsight, something that the Federal Circuit has repeatedly cautioned against. *See In re Kotzab*, 217 F.3d 1365, 1370 (Fed. Cir. 2000) ("The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art."); *see also In re Lee*, 277 F.3d 1338, 1342-44 (Fed. Cir. 2002) (discussing the importance of relying on objective evidence and making specific factual findings with respect to the motivation to combine references); *In re Jones*, 958 F.2d 347 (Fed. Cir. 1992); *In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988). Therefore, Applicants respectfully request that the rejection of these claims be withdrawn.²

¹ Contrary to the Office Action's position, Dragoo does not disclose absorbent articles having more than one size. Instead, Dragoo only discloses a package that includes disposable articles having different absorbent capacities. Dragoo, Col. 12, ll. 54-57. Although Dragoo does disclose the inclusion of inserts, these inserts are to be used in combination with the disposable diaper to form a combined disposable diaper. *Id.* at Col. 11, ll. 64-67.

² In addition, as a source for motivation, the Office Action provides several unsubstantiated statements. For example, the Office Action asserts that "it is well known and obvious to one of ordinary skill in the art at the time the invention was made to provide sizing information on packages of absorbent articles so that the consumer can purchase the correct size." Office Action, Page 5. Such a statement must be supported by evidence, either in the form of prior art or by Official Notice. *See* MPEP 2144.03. Absent such evidence, Applicants respectfully request that these rejections be withdrawn.

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Assuming *arguendo* that there is sufficient motivation in the prior art to modify Dragoo, the proposed modification fails to disclose or suggest all claim limitations. For example, independent claim 1 recites, *inter alia*,

A visual identification device for absorbent products, the device comprising:

* * *

an association between each of the two or more absorbent product designations and a combination of one of the size designations and one of the absorbency designations, wherein the association identifies one or more absorbent product designations that are predicted to satisfy a user's fit and absorbency requirements....

Appl'n, Claim 1 (emphasis added).³ Although the Office Action makes passing reference to this claim element, the Office Action fails to provide any insight as to *how* Dragoo would be modified to "inform the consumer about what type of absorbent article to use depending on the child and signals displayed by the child" or how the claimed "association between each of the two or more absorbent product designations and a combination of one of the size designations and one of the absorbency designations" would be conveyed. Therefore, because Dragoo, as modified, fails to disclose all claim limitations, Applicants respectfully request that this rejection be withdrawn.

With regard to independent claims 40, 42, 43 and 45, Dragoo, as modified, does not disclose or suggest the claimed "absorbent product line" and its elements. For example, with regard to independent claim 40, Dragoo does not disclose the claimed designations and combinations of designations, and the Office Action has not modified Dragoo to include these designations and combinations, nor has the Office Action addressed such designations and combinations of designations. Therefore, because Dragoo, as modified, fails to disclose all claim limitations, Applicants respectfully request that the rejection of these claims be withdrawn.

³ Independent claims 14, 22 and 30 recite similar limitations.

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VII. CONCLUSION

Applicants respectfully submit that the application is in condition for allowance. Applicants believe that no fees are necessary in connection with the filing of this document. In the event any fees are necessary, please charge such fees, including fees for any extensions of time, to the undersigned's Deposit Account No. 50-0206. Should any outstanding issues remain, the Examiner is invited to telephone the undersigned at the number listed below.

Dated: July 6, 2005

By:

Respectfully submitted,
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